BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

Date: March 17, 1998
Case Nos: 97-INA-153

In the Matter of:

CREST CO.
Employer

On Behalf of:

FRANZ ALVARO TORRES
Alien

Before: Holmes, Jarvis and Vittone
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Franz Alvaro Torres("Alien") filed by Employer Crest Co.("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, Philadelphia, Pennsylvania denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On May 24, 1995, the Employer filed an application for labor certification to enable the Alien to fill the position of Laundry Supervisor in its Dry Cleaner business.

The duties of the job offered were described as follows:

"Supervises and coordinates activities of workers engaged in receiving, marking, washing, and ironing clothes or linen in laundry: Determines sequence in which flatwork, one-day service, and white and colored work are to be scheduled through laundry to provide quick and efficient service to customers and to regulate work loads. Inspects articles to determine m(e)thods of specific cleaning requirements. Inspects finishes laundered articles to ensure conformance to standards."

No specific education and 2 years experience in the job were required. Special requirement was: must be in good health; no smoking on premises. Wages were $8.75 per hour. The applicant reports to the Manager and supervises 3 employees. (AF-23-29)

On July 9,1996, the CO issued a NOF denying certification, citing possible violation of Section 656.21(b)(6), rejection of U.S. workers. "You reported that Mr. (Stephen) Gibbs was referred to you by the State Agency for this job opportunity, but he did not contact you for an interview. A failure to contact applicants at all is essentially considered an untimely contact. When the employer has the name(s) address(es) and/or telephone number(s) or access to same, the employer cannot refuse to contact applicants because those applicants did not contact the employer after referral from the State Agency. Therefore the actions by the employer also indicate a lack of a "good faith" recruitment effort".

On August 22, 1996 the Employer forwarded a rebuttal stating that Employer at three times during the week of August 2, 1996 called Mr. Gibbs and left messages for him, which were not responded to. Subsequently a certified letter was sent. "I think you would agree that Mr. Gibb's disinterest in the position can be traced to his failure to contact the employer originally and now extends to his failure to give the employer even so much as a return call to three different messages and a certified Letter."(AF-10-14)

On November 4, 1996, the CO issued a Final Determination denying certification, based on failure to contact Mr. Gibbs at the time of application. Contact after the issuance of the NOF does not cure the initial violation. (AF-4-6)

On November 17, 1996, the Employer filed a request for Judicial Review of denial of labor certification. (AF-1,2)

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 88-INA-313 (1989); Belha Corp., 88-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 92-INA-321 (Aug. 4, 1993).

Section 212(a)(14) of the Immigration and Nationality Act of 1952 (amended by 212(a)(5)(A) of the Immigration Act of 1990 and recodified as 8 U.S.C. 1182(a)(5)(A)) was enacted to exclude aliens competing for jobs American workers could fill and to "protect the American labor market from an influx of both skilled and unskilled foreign labor." Cheung v District Director, INS, 641 F.2d 666(9th Cir.1981): Wang v. INS, 602 F.2d 211 (9th Cir. 1979). To achieve this Congressional purpose, the regulations set forth a number of provisions designed to ensure that the statutory preference favoring domestic workers is carried out wherever possible. 20 C.F.R. 656.2(b) quotes 291 of the Immigration and Nationality Act, 8 U.S.C. 1361 as follows:

> Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of the Act.

The legislative history of the 1965 amendments to the Act establishes that the burden of proof for obtaining labor certification be on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in U.S. Code Cong. & Ad News 3333-3334.

In the instant case, the Employer's attempt to rebut the CO's finding regarding the failure to contact applicant Gibbs until after the NOF was issued is not sufficient rebuttal. It is a long held principle that an unjustified delay in contacting a U.S. applicant is presumed to contribute to an applicant's unavailability. Creative Cabinet and Store Fixture, 89-INA-181 (Jan. 24, 1990)(en banc); Michele's Home Care,95-INA-610 (May 23, 1997). Certainly, failure to contact an applicant until after the NOF is issued is untimely.

ORDER

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Panel:

_____
JOHN C. HOLMES
Administrative Law Judge

BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

Date:
Case No: 95-INA-286

In the Matter of:

M.K. DESIGNERS, INC.
Employer

On Behalf of:

SETRAK MERACHIAN
Alien

Appearance: Baliozian & Associates

for the Employer and the Alien

Before: Holmes, Huddleston and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Setrak Marachian ("Alien") filed by Employer M.K.Designers, Inc. ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California, denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On April 15, 1993, the Employer filed an application for labor certification to enable the Alien, a Lebanese national, to fill the position of Wood Machinist in its cabinet and furniture manufacturing and construction company.

The duties of the job offered were described as follows:

Responsible for set up and operation of woodworking

machinery for fabrication of doors, windows, cabinets, and fine furniture. Operate power saws, drills, drill presses, sanders, tenoner, mortising machine, boring machine, router,and hand tools. Prepare parts according to specifications. Follow intricate design specifications for furniture orders.

No educational requirements and two years experience in the job were required. Wages were $640.00 per week. (AF-25-53)

On June 22, 1994, the CO issued a NOF denying certification, finding that a U.S. applicant, Kenneth R. Pruett was unlawfully rejected. Employer alleged in his undated recruitment results report that applicant Pruett had stated the job site was too far. In a signed questionnaire from Mr. Pruett, he stated that he would not have turned down a job for $16.00 per hour, indeed, that he would have gone to Chicago or New York for that money. He further stated that he received a phone call from a woman who asked him if he could do carvings. She also asked if he could speak Farsi. The woman told him he was not qualified and hung up.(AF-21-23)

Employer, June 29, 1994, forwarded its rebuttal, stating: "As Mr. Pruett stated to you in his questioneer, Mrs. Keuroghlian asked the applicant if he had experience doing wood carving, using the specialized equipment and hand tools as was required in the job description, to construct some of the more intricate detail designs on furniture and cabinets. He responded that he was not able to do carvings. It was based upon this response that he was told that he was probably not qualified. Mr. Pruett also stated to Mrs. Keuroghlian that the job site in Glendale was too far to come for a job." (AF-9-20)

On August 23, 1994, the CO issued a Final Determination denying certification since Mr. Pruett as a master carpenter according to his resume who owned and operated a custom cabinet shop was qualified for the job opportunity. The fact that he cannot do carvings with chisels is not pertinent since the duty was not listed on the ETA 750A form. (AF-6-8)

On September 7, 1994, Employer filed a request for review and reconsideration of Final Determination. (AF-1-5)

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 88-INA-313 (1989); Belha Corp., 88-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 92-INA-321 (Aug. 4, 1993).

Section 656.21(b)(6) provides that an employer must show that

U.S. applicants were rejected solely for job-related reasons. Employers are required to make a good-faith effort to recruit qualified U.S. workers for the job opportunity. H.C. LaMarche Ent.,Inc. 87-INA-607 (1988). As a general matter, an employer unlawfully rejects an applicant where the applicant meets the employer's stated minimum requirements, but fails to meet requirements not stated in the application or the advertisements. Jeffrey Sandler, M.D., 89-INA-316 (Feb.11, 1991)(en banc).

We find the CO was correct in finding that the rejection of Mr. Pruett was unlawful, in that he appeared well qualified for the position and expressed an interest in accepting same. Employer's reason for rejection was that applicant was not familiar with a hand chisel, a duty that was not set out in the job requirement and would not appear to be accurate, given his long and intimate experience in the field. Where an applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant is qualified, although the resume does not expressly state that he or she meets all the job requirements, an employer bears the burden of further investigating the applicant's credentials. Gorchev & Gorchev Design, 89-INA-118 (Nov. 29, 1990)(en banc).

ORDER

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Panel:

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JOHN C. HOLMES
Administrative Law Judge

BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

Date:
Case No: 95-INA-0554

In the Matter of:

BUCIO INTERNATIONAL FOODS, INC.
Employer

On Behalf of:

AUDBERTO FLORES

Alien

Appearance: Lillian Sondon, Esq.
for the Employer and the Alien

Before: Holmes, Huddleston and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Audberto Flores ("Alien") filed by Employer Bucio International Foods, Inc. ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California, denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On August 30, 1993, the Employer filed an application for labor certification to enable the Alien to fill the position of Senior Civil Engineer in its Civil Transportation Engineering Consulting company.

The duties of the job offered were described as follows:

Transportation Studies, Traffic Engineering, Highway design and construction inspection. Perform traffic impact studies. Conduct traffic surveys and data collection and use highway capacity software (HCS) to analyze data collected. Prepare right-of-way maps. Conduct research on property deeds. Plot property lines on base maps. Conduct research on property deeds. Plot property lines on base map. Prepare proposals and reports for new jobs. Schedule meetings with clients and act as company Senior Traffic Engineer.

A B.S. in Engineering and 5 years experience in the job were required. Wages were $20.37 per hour. The applicanty would supervise 5 employees and report to the Presdient. (AF-1-44)

On February 23, 1995, the CO issued a NOF denying certification. The CO alleged that employer may have violated 20 C.F.R. 656.21(b)(5)in that either alien did not have the requisite experience required as set out in the application or that he is not now serving as a Senior Traffic Engineer, and that other U.S. workers could be trained for the job. The CO required documentation if employer could not train a U.S. worker if alien is currently holding that position. Secondly, the CO found that three of the four U.S. applicants, Mohamed Azzat, Alexander Frenzel, and Francis B. Sarpong were unlawfully rejected.(AF-47-51)

Employer, April 25, 1995, forwarded its rebuttal, stating that at the time of hire, alien had the requisite 5 years experience as a Senior Transportation Engineer. In that connection, a letter was attached dated December 3, 1984 from the President of Cvtra International Consultants, an Nigerian company, that informed alien he had been appointed "Senior Transportation Engineer". This was the same company that alien's resume indicated he was employed until Dec. 1989. Additionally, correspondence between Employer and the New Jersey Department of Transportation demonstrated alien's assignment for a specified period as a Senior Traffic Engineer working on traffic and highway matters requiring HAPS computer usage and knowledge of New Jersey State Highway Access Management Code, *inter alia.* (AF-AF-52-62,67)

On May 2, 1995, the CO issued a Final Determination denying certification since the three applicants were rejected on the basis of their resumes only. "It would appear, based on the presented credentials, that a good faith effort would have included contacting and interviewing these applicants. At the very least, by failing to interview these three applicants, the employer has not established or proven they are unqualified or unavailable." (AF-52-62)

On May 31, 1995, Employer filed a request for review and reconsideration of Final Determination. (AF-66-73)

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 88-INA-313 (1989); Belha Corp., 88-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 92-INA-321 (Aug. 4, 1993).

Section 656.21(b)(6) provides that an employer must show that U.S. applicants were rejected solely for job-related reasons. Employers are required to make a good-faith effort to recruit qualified U.S. workers for the job opportunity. H.C. LaMarche Ent.,Inc. 87-INA-607 (1988). Where an applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant is qualified, although the resume does not expressly state that he or she meets all the job requirements, an employer bears the burden of further investigating the applicant's credentials. Gorchev & Gorchev Design, 89-INA-118 (Nov. 29, 1990)(en banc). On the other hand, where the Final Determination does not respond to Employer's argfuments or evidence on rebuttal, the matters are deemed to be successfully rebutted and are not in issue before the Board. Barbara Harris, 88-INA-32. (April 5, 1989) Thus where a CO fails to address contentions raised by Employer on rebuttal, the CO may be reversed. Duarte Gallery, Inc., 88-INA-92 (October 11, 1989).

We believe the CO erred in flatly finding alien was not

ORDER

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Panel:

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JOHN C. HOLMES
Administrative Law Judge

BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

Date:

Case No: 95-INA-286

In the Matter of:

M.K. DESIGNERS, INC.
Employer

On Behalf of:

SETRAK MERACHIAN
Alien

Appearance: Baliozian & Associates
for the Employer and the Alien

Before: Holmes, Huddleston and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Setrak Marachian ("Alien") filed by Employer M.K.Designers, Inc. ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California, denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the

CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On April 15, 1993, the Employer filed an application for labor certification to enable the Alien, a Lebanese national, to fill the position of Wood Machinist in its cabinet and furniture manufacturing and construction company.

The duties of the job offered were described as follows:

> Responsible for set up and operation of woodworking machinery for fabrication of doors, windows, cabinets, and fine furniture. Operate power saws, drills, drill presses, sanders, tenoner, mortising machine, boring machine, router,and hand tools. Prepare parts according to specifications. Follow intricate design specifications for furniture orders.

No educational requirements and two years experience in the job were required. Wages were $640.00 per week. (AF-25-53)

On June 22, 1994, the CO issued a NOF denying certification, finding that a U.S. applicant, Kenneth R. Pruett was unlawfully rejected. Employer alleged in his undated recruitment results report that applicant Pruett had stated the job site was too far. In a signed questionnaire from Mr. Pruett, he stated that he would not have turned down a job for $16.00 per hour, indeed, that he would have gone to Chicago or New York for that money. He further stated that he received a phone call from a woman who asked him if he could do carvings. She also

Date:
Case No: 95-INA-286

In the Matter of:

M.K. DESIGNERS, INC.
Employer

On Behalf of:

SETRAK MERACHIAN
Alien

Appearance: Baliozian & Associates
for the Employer and the Alien

Before: Holmes, Huddleston and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Setrak Marachian ("Alien") filed by Employer M.K.Designers, Inc. ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California, denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

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Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On April 15, 1993, the Employer filed an application for labor certification to enable the Alien, a Lebanese national, to fill the position of Wood Machinist in its cabinet and furniture manufacturing and construction company.

The duties of the job offered were described as follows:

> Responsible for set up and operation of woodworking machinery for fabrication of doors, windows, cabinets, and fine furniture. Operate power saws, drills, drill presses, sanders, tenoner, mortising machine, boring machine, router,and hand tools. Prepare parts according to specifications. Follow intricate design specifications for

furniture orders.

No educational requirements and two years experience in the job were required. Wages were $640.00 per week. (AF-25-53)

On June 22, 1994, the CO issued a NOF denying certification, finding that a U.S. applicant, Kenneth R. Pruett was unlawfully rejected. Employer alleged in his undated recruitment results report that applicant Pruett had stated the job site was too far. In a signed questionnaire from Mr. Pruett, he stated that he would not have turned down a job for $16.00 per hour, indeed, that he would have gone to Chicago or New York for that money. He further stated that he received a phone call from a woman who asked him